LOW TENG HAI

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CRIMINAL APPLICATION NO. 44-13-91]
13 FEBRUARY 1992

ADMINISTRATIVE LAW: *Application for habeas corpus - Preventive detention - Detenu removed from Pulau Jerejak to Simpang Rengam Johor - Whether lawful - Non compliance with statutory rules and evidential presumption.*

EVIDENCE: *No evidence to show Minister made the said order before the detenu's actual removal from Pulau Jerejak - Whether evidential presumption that judicial and official acts have been regularly performed to apply - Whether this discretionary presumption can be called in aid by the respondents - Because in the very nature of habeas corpus proceedings - What is questioned is the regularity of the exercise of official acts or powers - Two possible inferences can be drawn from the facts - Inferences favourable to the detenu preferred.*

STATUTORY INTERPRETATION: *Whether the language of r. 3(3) imposed upon the officer-in-charge of the centre - The statutory duty to remind the detenu upon arrival at the centre of his right to make representations to the advisory board and that failure on the part of the officer - Whether constituted a statutory breach - And whether the said breach - Is a breach of a mandatory requirement rendering the detention unlawful - Or - Whether the said requirement is only a directory proviso, Rule 3(3) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 made pursuant to s. 9(3) of the Act.*

This is an application for *habeas corpus* by "the detenu" - who is presently undergoing detention under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985.

The detenu originally was ordered on 22 September 1990 by the Minister for Home Affairs to be detained for a period of 2 years at the Rehabilitation Centre at Pulau Jerejak, Penang. He was brought to this centre on the next day and was detained there until 14 May 1991 when he was removed to the Rehabilitation Centre at Simpang Rengam Johor, as a result of an order made by the Minister on the same day, in exercise of his powers conferred by s. 15(1) of the act directing that such removal be made.

The detention has now been challenged on two grounds, namely:

(1) that there was a breach of r. 3(3) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 made pursuant to s. 9(3) of the Act; and

(2) that there is no evidence to show that the Minister in making the order directing the removal of the detenu from Pulau Jerejak to Simpang Rengam did so before the detenu's actual removal from Pulau Jerejak.

The learned Judge also observed that the averment of the Secretary of the Advisory Board in her affidavit show that representations were in fact made by the detenu because they were received by the board on 29 September 1990 and heard on 14 November 1990.

It was also noted that there was no dispute that the detenu had been informed of his right to make representations against the detention order by the public officer concerned as provided for under r. 3(1) as deposed to by the officer concerned in his affidavit.

The critical issue that was raised as the contentious matter of dispute was the averment for the detenu that the language of r. 3(3) imposed upon the officer in charge of the centre the duty to remind the detenu upon arrival at the centre of his sight to make representations to the Advisory Board and that failure on the part of the officer in charge to do so constituted a serious breach of a mandatory requirement rendering the detention unlawful.

Held:

[1] In the circumstances (ratio in *Puvaneswaran's* case applied) the learned Judge took the view that the requirement to remind the detenu of his right to make representations is similarly a mandatory requirement and non-compliance with it renders the detenu's detention unlawful.

[2] The learned Judge observed that there is nothing in the (respondent's) averment to indicate that the removal order was actually made before the detenu's physical removal from the centre at Pulau Jerejak. Nor does the exhibit MJM A-3 dated 14 May 1991 show anywhere that the order directing the detenu's removal was so made. It is possible that the detenu who was apparently removed from Pulau Jerejak in the far north and transported to Simpang Rengam in the far south could have been moved before the Minister actually signed the removal order.

[3] Can the presumption then in s. 114(e) of the Evidence Act 1950 to the effect that judicial and official acts have been regularly performed apply? It is the contention of learned Counsel for the detenu that this discretionary presumption cannot be called in by the respondents because by the very nature of *habeas corpus* proceedings what is questioned is the regularity of the exercise of official acts or powers. This Court agrees.

[4] This Court finds itself in agreement on the submitted authority of *Ng Choon Mon* v. *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1990] 1 MLJ 38, that since two possible inferences can be drawn from the facts as presented by the affidavit evidence the inference favourable to the detenu must be preferred in the event, the detenu also succeeds in his application on the second ground.

[The detenu must therefore be set at liberty forthwith.]

Cases referred to:

Ng Choon Mon v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. [1990] 1 MLJ 38 ***(foll)***

Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. [1991] 3 MLJ 28 ***(foll)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 9(3), 15(1)
Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 3(3)
Evidence Act 1950, s. 114 illus.(e)
Public Order and Prevention of Crime (Procedure) Rules 1972, r. 3(2)

For the accused - W. Ng; M/s. Kam Woon Wah
For the respondent - Ahmad Zaidi Ibrahim, DPP

JUDGMENT

LC Vohrah J:

This is an application for *habeas corpus* by one Low Teng Hai (the detenu) who is presently undergoing detention under s. 6 (1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act).

The detenu originally was ordered on 22 September 1990 by the Minister for Home Affairs to be detained for a period of 2 years at the Rehabilitation Centre at Pulau Jerejak, Penang. He was brought to this centre on the next day and was detained there until 14 May 1991 when he was removed to the Rehabilitation Centre at Simpang Rengam, Johor, as a result of an order made by the Minister on the same day, in exercise of his powers conferred by s. 15(1) of the Act directing that such removal be made.

The detention has now been challenged on two grounds namely:

(1) that there was a breach of r. 3 (3) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 made pursuant to s. 9 (3) of the Act; and

(2) that there is no evidence to show that the Minister in making the order directing the removal of the detenu from Pulau Jerejak to Simpang Rengam did so before the detenu's actual removal from Pulau Jerejak.

To consider the first ground I would begin by setting out the relevant provisions of r. 3 as follows:

> 3.(1) When any person is served with a detention order, the police officer serving the detention order shall at that same time:
>
> (a) inform that person of his right to make representations against the detention order; and
>
> (b) provide him with three copies of Form I prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.
>
> (2) A detained person who desires to make any representation shall complete Form I and shall forward two copies of the completed Form I duly signed by him to the secretary through the officer in charge of the Police District where the detention order was served or the officer in charge of the place of detention.
>
> (3) When a detained person is brought to a place of detention, the officer in charge **shall as soon as practicable remind the person of his right to make representations.**
> (Emphasis is mine)

The officer in charge of the Rehabilitation Centre at Pulau Jerejak in his affidavit Encl. (7) had this to say with regard to his compliance with r. 3 (3) as follows:

> Saya telah memberitahu, menerangkan dan mengingatkan pemohon tentang haknya untuk mendapatkan khidmat peguam. Saya juga telah menggunakan Bahasa Malaysia yang mudah difahami oleh pemohon dan beliau telah mengakui memahami Bahasa Malaysia setelah saya bertanya kepadanya sama ada beliau faham atau tidak penerangan saya.

This averment does not state that the officer in charge did remind the detenu of his right to make representation apart from his informing the detenu in no uncertain terms of his right to the service of a lawyer. It is noted, however, that the averments of the Secretary of the Advisory Board in her affidavit Encl. (9) show that representations were in fact made by the detenu because they were received by the board on 29 September 1990 and heard on 14 November 1990. It is also noted that there is no dispute that the detenu had been informed

of his right to make representations against the detention order by the police officer concerned as provided for under r. 3(1) as deposed to by the officer concerned in his affidavit encl. (16). However, it is the contention of learned Counsel for the detenu that the language of r. 3 (3) imposed upon the officer in charge of the centre the duty to remind the detenu upon arrival at the centre of his right to make representations to the Advisory Board and that the failure on the part of the officer in charge to do so constituted, on the authority of *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*. [1991] 3 MLJ 28, a serious breach of a mandatory requirement rendering the detention unlawful. That case concerned the interpretation of rather similar provisions of r. 3 (2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 as follows:

> 3(2) It shall be the duty of the officer in charge, when informing any detained person of his right to make representations, to provide him with two copies (or, if the detained person states that he intends to engage an advocate to represent him, three copies) of Form I in the schedule.

It was held in that case that the requirement to deliver to the detainee the requisite number of copies of Form I was not a directory but a mandatory requirement the breach of which rendered "the detainee's detention unlawful".

The learned Deputy Public Prosecutor whilst agreeing with the finding of the learned Judge in *Puvaneswaran's* case has contended that the duty imposed upon the officer in charge under the Public Order and Prevention of Crime (Procedure) Rules 1972 is much heavier than that under the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 but has given no reason for this contention. He has also argued that since in the present case the detenu had already been informed by the police officer concerned of his right to make representations against the detention order and since the detenu had in fact made representations to the Advisory Board the detenu had not been prejudiced in any way. He further argued that as the officer in charge had informed the detenu of his right to the services of a lawyer it can be assumed that he had reminded the detenu of his right to make the representations. In the light of these opposing contentions what approach should the Courts take? I think the very answer to this question can be found in *Puvaneswaran's* case where in relation, as mentioned, to somewhat similar provisions, Edgar Joseph Jr. J had this to say (at pp. 31 and 32):

> I would in passing, observe that r. 3 suggests that Parliament requires an independent person, namely, the officer-in-charge of the detention centre to fulfill the duties imposed by it. The only attempt to do so was by the police officer, Encik Subramaniam, and this attempt too was not successful in that only one copy of Form I instead of the requisite two copies were served upon the detainee.
>
> It follows, therefore, that there has been a serious breach of the mandatory requirements of r. 3(2) the effect of which is to render the detainee's continued detention unlawful. *It matters not one whit that the detainee did in fact make representations to the Advisory Board which considered the same and made recommendations thereon which led to the detainee's continued detention. In other words, once a breach of a mandatory statutory requirement is established, the fact that the detainee was not prejudiced is irrelevant.* It is only where a breach of a directory provision is involved that it would be material to consider whether a detainee has suffered any ensuing prejudice.
> (Emphasis added)

In the circumstances, I am impelled to the view that the requirement to remind the detenu of his right to make representations is similarly a mandatory requirement and non-compliance with it renders the detenu's detention unlawful.

That should dispose of this application but as the second ground raised by learned Counsel is a common ground in two other applications, namely Criminal Applications No. 44-17 of 1991 and No. 434-19 of 1991, I now proceed to consider this ground also.

It is the contention of learned Counsel for the detenu that in exercising his powers pursuant to s. 15(1) of the Act to remove the detenu from the Rehabilitation Centre at Pulau Jerejak to that at Simpang Rengam there must be evidence to show that the removal order was made before the detenu was actually removed from Pulau Jerejak. Section 15(1) reads:

> The Minister may by order direct the removal from any place of detention to another place of detention to be specified in such order of any person detained under subsection (1) of s. 6, or under subsection (1) of s. 11 A, to be there detained for the whole or any part or parts of such period for which it has been ordered that such person shall be detained.

In his affidavit Encl. (8) at para. 8 the Minister averred:

> Merujuk kepada perenggan 11 affidavit pemohon, pada 14 Mei 1991, saya telah mengeluarkan Perintah Perpindahan di bawah s. 15 yang mengarahkan supaya pemohon dipindahkan dari Pusat Pemulihan Akhlak Pulau Jerejak, Pulau Pinang ke Pusat Pemulihan Akhlak Simpang Rengam Johor. Salinan perintah tersebut yang telah disahkan adalah dilampirkan dan ditandakan sebagai "MJMA 3".

It has been urged by the learned Deputy Public Prosecutor that from the language of this averment made by the Minister in answer to the detainee's allegation that his removal was contrary to law, it is clear that the order must have been made before the removal. I must observe that there is nothing in the averment to indicate that the removal order was actually made before the detenu's physical removal from the centre at Pulau Jerejak. Nor does the Exh. MJMA3 dated 14 May 1991 show anywhere that the order directing the detenu's removal was made. It is possible that the detenu who was apparently removed from Pulau Jerejak in the far north and transported to Simpang Rengam in the far south could have been moved before the Minister actually signed the removal order. Can the presumption the in s. 114 (e) of the Evidence Act 1950 to the effect that judicial and official acts have been regularly performed apply? It is the contention of learned Counsel for the detenu that this discretionary presumption cannot be called in aid by the respondents because by the very nature of habeas corpus proceedings what is questioned is the regularity of the exercise of official acts or power. I have to agree. In the circumstances, I find myself also in agreement with learned Counsel for the detenu when he submits on the authority of *Ng Choon Mon v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. & another application* [1990] 1 MLJ 38, that since two possible inferences can be drawn from the facts as presented by the affidavit evidence the inference favourable to the detenu must be preferred: per Mustapha Hussain J at p. 41. In the event, the detenu also succeeds in his application on the second ground.

The detenu must therefore be set at liberty forthwith.

As it was agreed between learned Counsel and the learned Deputy Public Prosecutor that the result of this application will bind the parties in Criminal Application No. 44-15 of 1991, I make an order for the detainee in that case also to be set free forthwith.

In view of my finding on the second ground, the detainees in Criminal Applications No. 44-17 of 1991 and 44-19 of 1991 must also be set free forthwith.

Also found at [1992] 2 CLJ 1037